Article 101 TFEU

DR KAROLINA MOJZESOWICZ
EU ANTITRUST AND MERGERS
UJ
Article 101TFEU

- **Objectives:**

- each economic operator must determine independently the policy, which he intends to adopt on the market
Structure of Article 101 (1) TFEU

• first paragraph: prohibition in principle

"The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which ..."
- structure of Article 101 (I) TFEU
  - Undertakings
  - Agreement
  - Restriction of competition
    - Object
    - Effect
- must (appreciably) affect trade between Member States
Structure of Article 101 TFEU

- **second paragraph: sanction**

  "Any agreements or decisions prohibited pursuant to this Article shall be automatically void."

  → according to national private law!

- **third paragraph: exception** (see separate slides)

  "The provisions of paragraph 1 may ... be declared inapplicable ..."
Field of application of Art 101 TFEU

if ...

- (parties :) undertakings *(see above)*
- (behaviour :) *agreements, decisions by associations, concerted practices*
- (object or effect :) *prevention, restriction or distortion of competition*
- (EU dimension :) *trade between Member States may be affected*

... then

- *prohibited as incompatible with internal market*

... unless

- *Exempted*
“Affect inter-State Trade”

• Trade between Member States
  ○ includes services and all cross border economic activity
  ○ national markets
• May affect
  ○ Direct or indirect, actual or potential
  ○ Sufficient degree of probability
• Appreciability
Undertakings
(discussed during the first class)

- **Undertakings:**
  - Every entity, for example:
    - Natural people
    - Legal persons, companies; co-operatives
    - States, Höfner (*Federal Employment Office*)
  - Engaged in economic activity, for example:
    - Look at specific activity at issue
  - Regardless of the way that its financed

- **Single economic entity doctrine**
Agreements, decisions and concerted practices:

- Overlap with each other
- The Commission with ECJ’s approval not strict in the categorisation
- Defined as Community law concepts which allow a distinction between the unilateral conduct of an undertaking and co-ordination of behaviour or collusion between undertakings
- Co-ordination of behaviour or collusion where at least one undertaking vis-à-vis another undertaking undertakes to adopt a certain conduct on the market or that as a result of contacts between them uncertainty as to their conduct on the market is eliminated or at least substantially reduced
Agreements

- Concurrence of wills, form unimportant – faithful expression of the parties’ intention (Bayer judgments – tacit acquiescence must be proven by "apparent" unilateral actions T-41/96 Bayer para 71)
- Vertical and horizontal agreements (Consten and Grunding judgment)
- Examples:
  - Contracts
  - Gentleman’s agreements
  - Oral
  - Understandings even if no enforcement mechanisms
  - Even if not in the interest of all the undertakings concerned
- No defence that:
  - Parties never intended to implement
  - One was forced by other
- Limited exceptions, e.g. collective bargaining agreements between workers and employers to improve working conditions (Albany)
Decisions by associations of undertakings

- Agreements within the framework of collective or representative bodies (trade associations)

- Examples:
  - Cement dealers’ association
  - National Bar association
  - The international Olympic Committee (Meca-Medina judgment)
Concerted Practices

• Definition
  ○ A form of coordination between undertakings which, without having reached the stage where and agreement properly so-called has been concluded, knowingly substitutes practical for the risks of competition (Dyestuffs ECJ judgment). E.g. directly or indirectly:
    ▪ Disclosing their own future course of conduct on the market
    ▪ Influencing another’s course of conduct on the market
  ○ Reciprocity (low threshold)
    ○ Object or effect of contact was to create conditions of competition, which do not reflect the normal market conditions
      ▪ Objective test
      ▪ Presumption

• No need for:
  ○ Any effects on the market
  ○ Working out of an actual plan
concerted practice

- Does not include intelligent adaptation to existing and anticipated conduct of competitors without any direct or indirect contact (Sukier Unie judgment)
- Exchange of information:
  - Unilateral or reciprocal exchange of individualised commercially sensitive information amongst undertakings – a rebuttable presumption of a concerted practice
  - Exchange of info pro statistical or benchmarking purpose allowed under conditions set out in COM Guidelines on horizontal co-op agreements
- Difficult to prove: concerted practice as the only plausible explanation of the conduct – Woodpulp judgment
Agreements horizontal or vertical

- horizontal agreements: between undertakings on the same level of the market (actual or potential competitors)
- vertical agreements: agreements entered into between companies operating at different levels of the production or distribution chain (e.g. distribution agreements between manufacturers and wholesalers or retailers).
Restriction of Competition

- assessment within the actual context in which competition would occur in the absence of the agreement with its alleged restrictions
- likely impact of the agreement on inter-brand competition (i.e. competition between suppliers of competing brands) and on intra-brand competition (i.e. competition between distributors of the same brand) must be taken into account
Restriction by object or effect

- Art. 101 (1) distinguishes between agreements that have a restriction of competition as their **object** (by **object**) and agreements that have a restriction of competition as their **effect** (by **effect**)
- Object and effect are alternatives
- For Article 101(3) object/ effect is not relevant
"Restrictions of competition by object" are those that by their very nature have the potential of restricting competition. These are restrictions which in light of the objectives pursued by the Community competition rules have such a high potential of negative effects on competition that it is unnecessary for the purposes of applying Article [101] (1) to demonstrate any actual effects on the market. This presumption is based on the serious nature of the restriction and on experience showing that restrictions of competition by object are likely to produce negative effects on the market and to jeopardize the objectives pursued by the Community competition rules."
restrictions by object

• Concerns the aims pursued by the agreement
• Agreement which by its very nature has the potential of restricting competition – agreement which in itself reveals a sufficient degree of harm to competition
• Agreements which in light of the objectives pursued by the Community competition rules have such a high potential of negative effects on competition that it is unnecessary for the purposes of applying Article 101(1) to demonstrate that they have any actual effects on the market
by object

- horizontal agreements e.g.: price fixing, output limitation and sharing of markets and customers
- vertical agreements e.g.: fixed and minimum resale price maintenance (i.e. vertical fixing of prices) and restrictions providing absolute territorial protection on distributor
**Cartels**

Undertakings join together to fix prices/ limit production/share markets or customers

- Instead of competing - rely on agreed course of action
- **Reduces incentives** to provide new/better products and services at competitive prices
- Result: consumers end up **paying more** for less quality
- **Illegal** and highly secretive
- (Heavy fines
- **Leniency policy** for fine reduction – “whistle-blowers”)
By effect

- The agreements have as their effect the restriction of competition
- Define the relevant market (nature of the products, the market position of the parties, the market position of competitors, the market position of buyers, the existence of potential competitors and the level of entry barriers)
- Actual or potential effect (must have likely anti-competitive effects, no presumption)
- Effects appreciable (check the degree of market power), de minimis rule unless hard-core restriction
- legal and economic context
Why effect analysis is necessary

- horizontal agreements can lead to **substantial economic benefits**, in particular if they combine complementary activities, skills or assets
- (similarity with the analysis of horizontal mergers)
- see Guidelines on the assessment of horizontal co-op agreements
vertical agreements

- Vertical restraints are generally less harmful than horizontal restraints
- an agreement between a supplier and a buyer can contain "restraints" on the supplier or the buyer like:
  - the manufacturer sells only to one or to a limited number of buyers (exclusive distribution, selective distribution) = this may lead to other buyers being excluded from the market and/or to collusion between buyers.
  - a non-compete obligation which prohibit distributors from purchasing and reselling products from other manufacturers, who compete which each other = this may hinder market entry of new manufacturers and reinforce the market positions of incumbent manufacturers.
Positive effects of vertical restraints

- solve a "free-rider" problem
- "open up or enter new markets"
- "Economies of scale in distribution"
- "Uniformity and quality standardisation"
Vertical restraints

Negative effects:
(a) anticompetitive foreclosure of other suppliers or other buyers by raising barriers to entry or expansion;
(b) reduction of inter-brand competition;
(c) reduction of intra-brand competition;
(d) the creation of obstacles to market integration, including, above all, limitations on the possibilities for consumers to purchase goods or services in any Member State they may choose.
Vertical agreements which generally fall outside Art. 101(1)

- vertical agreements entered into by non-competing undertakings whose individual market share on the relevant market does not exceed 15\% (see also conditions of de minimis Notice)
- Agency agreements: the agent does not bear any, or bears only insignificant, risks in relation to the
  - contracts concluded and/or negotiated on behalf of the principal,
  - in relation to market-specific investments for that field of activity, and
  - in relation to other activities required by the principal to be undertaken on the same product market
Contractual restrictions

- Context in which the contractual restraint operates (C-234/89 *Delimitis*, paras 10-27)
- Does the agreement restrict actual or potential competition that would have existed in the absence of the contractual restraint(s)? (e.g. a supplier restricts its distributors from competing with each other, territorial or customer sales restrictions between distributors)
certain restraints may escape Article 101(1)
when they are objectively necessary for the existence of an agreement of that type or that nature (see Societe Techninque Miniere, Nungesser)

- Objective factors external to the parties themselves
- The question is whether given the nature of the agreement and the characteristics of the market a less restrictive agreement would not have been concluded by undertakings in a similar setting

E.g. territorial restraints in an agreement between a supplier and a distributor for a certain period of time, when objectively necessary in order for the distributor to penetrate a new market.
E.g prohibition imposed on all distributors not to sell to certain categories of end users when objectively necessary for reasons of safety or health related to the dangerous nature of the product in question.
Art 101 (3) Two types of exemptions

- Individual exemptions: Art. 101(3)
- Block exemptions: in the form of regulations for certain groups of agreements
Article 101(3)

- assessment under Article 101 consists of two steps:
  - 1) under Article 101(1),
  - 2) under Article 101(3),
    - only relevant when an agreement is found to be restrictive of competition within the meaning of Article 101(1),
    - Applied in order to determine the pro-competitive benefits produced by that agreement and to assess whether those pro-competitive effects outweigh the restrictive effects on competition
- Individual exemption check only if the block exemption does not apply
- Article 101(3)’s four cumulative conditions
Article 101(3)’s Four Conditions

- Anything is exemptable in theory
- Two ways to do this:
  - individual and
  - block exemption
- Article 101(3)’s four cumulative tests:
  - Improving production/ distribution of goods or technical/ economic progress
  - Fair share to consumers
  - Indispensable
  - Elimination of competition
- The burden of proof: acc. To Article 2 of Reg. 1/2003 rests on the undertaking(s) invoking the benefit of the exception rule
Improving production/distribution of goods or technical/economic progress

- Objective benefits (not to the parties)
- Balance benefits:
  - against the detriments under Article 101(1)
  - Relevant markets
- Balance at time of assessment, not when agreement made (*Commission 101(3) guidelines*)
- No need to focus on the specific wording
Fair share to consumers

• What are consumers
  ○ All direct or indirect users of the products covered by the agreement
    ⊢ Including producers that use the products as an input, wholesalers, retailers
    ⊢ Final consumers
  ○ Sometimes Commission examined society’s benefits

• What is a fair share?
  ○ must compensate for restriction of competition (Commission 101(3) guidelines)
  ○ The net effect of the agreement must at least be neutral from the point of view of consumers affected
Restrictions must be indispensible

- A two stage test:
  - Is restrictive arrangement reasonably necessary to achieve the benefits?
  - Are the individual restrictions that flow from the arrangement all reasonably necessary to attain its benefits?

- Many agreements fall at this hurdle
No elimination of competition

- Assess relevant market
- Consider actual and potential competition
Block exemptions – general pattern

- Declaration that prohibition under Art. 101(1) does not apply to the relevant type of agreement
- Market shares: typically application when a certain threshold is of the market shares of the parties is not exceeded
- Other conditions provided for in block exemptions
- Application of Art. 101(3) still possible
Block exemptions

- Regulation 330/2010 (Vertical restraints)
  - Normally apply this first, then Article 101(3)
  - Apply it with the Commission vertical guidelines
- Regulation 330/2010 and legal certainty
- Regulation 330/2010 creates a presumption of legality for vertical agreements depending on the market share of the supplier and the buyer
Structure of Regulation 330/2010

- **Article 1** – definition
- **Article 2** – Exemption
  - Vertical agreements to extent vertical restraints
  - Includes IPRs, as long as not primary object of agreements
  - Can be non-reciprocal agreements between competitors
  - Do not use this block exemption if subject falls into others
- **Articles 3 and 7** – Market share threshold
  - Supplier’s market share must be less than 30%
  - Buyer’s market share must be less than 30%
- **Article 4** – Hardcore restrictions
- **Article 5** – Excluded restrictions
- **Other:**
  - **Article 6** – Network effects
  - **Articles 10** – Validity (1 June 2010 to 31 May 2022)
Article 4 – Hardcore restrictions

- Article 2 exemption does not apply to *vertical agreements* which directly or indirectly, in isolation or combination with other factors, have as their object:
  - Restriction of buyer’s ability to determine its sale price, **BUT:**
    - Can have maximum or recommended sale price as long as they do not amount to fixed or minimum sale price
  - Restriction of territory or customers to whom buyer can sell, **BUT:**
    - Can restrict its place of establishment
    - Can limit active sales to territory or customer group
    - Can restrict sales to end users for buyers acting at wholesale level...
Article 5 – Excluded restrictions

• Article 2 exemption does not apply to the following obligations contained in vertical agreements:
  ○ Any direct or indirect non-compete obligation if indefinite or more than five years, UNLESS
    ♦ Goods sold by buyer from premises/land owned by the supplier
  ○ Any direct or indirect obligation causing the buyer, after termination of the agreement, not to manufacture, purchase, sell or resell goods or services, AS LONG AS:
    ♦ The obligation relates to goods or services which compete with the contract goods or services
    ♦ The obligation is limited to the premises and land from which the buyer has operated during the contract period
    ♦ The obligation is indispensable to protect know-how transferred by the supplier to the buyer
    ♦ The duration of the obligation is limited to a period of one year after termination of the agreement
  Can prohibit use and disclosure of know-how for unlimited time if not in public domain...
Consequences Art 101(2)

- If 101(1) breach proven, 101(3) can be invoked as a defence
- If conditions of Article 101(3) are not satisfied the agreement is null and void, cf. Article 101(2)
- Automatic nullity applies only to those parts of the agreement that are incompatible with Article 101, provided that such parts are severable from the agreement as a whole
- If only part of the agreement is null and void, for the applicable national law to determine the consequences thereof for the remaining part of the agreement